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Supreme Court of the United States

October Term, 1921.
No. 236.

UNION TRUST COMPANY OF SAN FRANCISCO and ALBERT LACHMAN, as executors of HENRIETTA S. LACHMAN, deceased,

Plaintiffs-in-error,

vs.

JUSTUS S. WARDELL, United States Collector of Internal Revenue for the First District of California, et al.,

Defendants-in-error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF MANSFIELD FERRY

FILED AS AMICUS CURIAE, AND ON BEHALF OF THE FARMERS' LOAN & TRUST COMPANY, Trustee, UNDER A TRUST CREATED BY MARIE LOUISE MACKAYE.

C. ALEXANDER CAPRON,
RUSSELL L. BRADFORD,
Of Counsel.

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Supreme Court of the United States.

October Term, 1921.

Union Trust Company, of San Francisco, and Albert Lachman, as Executors of the Last Will and Testament of Henriette S. Lachman, deceased, *Plaintiffs in Error*, *vs.* Justus S. Wardell, United States Collector of Internal Revenue for the First District of California, and John L. Flynn, United States Collector of Internal Revenue for the First District of California.	No. 236.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Brief of Mansfield Ferry as *amicus curiae*, and on behalf of The Farmers' Loan and Trust Com-

pany, Trustee, under a trust created by Marie Louise Mackaye, dated May 20th, 1914.

This brief, by permission of the Court, is filed by the undersigned as *amicus curiae* and on behalf of The Farmers' Loan and Trust Company, Trustee, under a deed of trust created by Marie Louise Mackaye under date of May 24, 1914, in which trust deed the income for life was to be paid to said Marie Louise Mackaye, and the property conveyed by this trust deed was upon the death of said Marie Louise Mackaye to go to her grandson, by marriage, Harold Steele Mackaye, absolutely and forever.

The facts in relation to the transfer under the deed of trust above mentioned are as follows: On the 24th of May, 1914, more than two years prior to the passage of the Revenue Act of September 8, 1916, Marie Louise Mackaye executed a deed of trust whereby she assigned and transferred to The Farmers' Loan and Trust Company, certain securities of the value at the date of her death of $83,389. The terms of the trust were that the income should be paid to the said Marie Louise Mackaye during her life, and that after her death leaving her grandson by marriage, Harold Steele Mackaye her surviving, the whole of the trust fund should be paid to the said Harold Steele Mackaye absolutely and forever. Further provision was made for disposition thereof in the event that said Harold Steele MacKaye should predecease the said Marie Louise Mackaye. The deed further provided that a portion of the principal of the trust fund, up to an amount equal to one-fourth of the value thereof at the time of the execution, should be paid to the said Marie Louise MacKaye should she require and direct the same in writing. Except as to this one-fourth, the

transfer was absolute and there was no power of revocation contained in the deed of trust.

Said Marie Louise Mackaye died on the 11th of December, 1916, intestate, being at the time of her death, a resident of Paris, France, and leaving no estate.

Notwithstanding the fact that this transfer was made long prior to the passage of the Act of 1916, and notwithstanding the fact that at the time of her death, Marie Louise Mackaye was a resident of Paris, France, over whom this Government had no jurisdiction, the Commissioner of Internal Revenue assessed a tax on the property held by the trustee at the date of death of the said Marie Louise Mackaye, which tax was paid under protest by the trustee.

The questions raised by the appeal of the Union Trust Company, of San Francisco, and Albert Lauchman, executors, plaintiffs in error, from the decision of the lower Court and the facts upon which these questions arise, have been clearly stated by the brief submitted on behalf of the plaintiff in error, and we shall not, therefore repeat what has there been stated.

We desire to express our hearty approval of the entire argument presented by counsel for the plaintiffs in error in their brief. In fact, we feel after careful consideration thereof, that there is little that can be added to the force of the argument there set forth. However, the decision of this case may have such far reaching effect that we deem it not inappropriate to present to this Court, our views in relation to certain of the questions involved, particularly those which deal with the constitutionality of the Act, if the construction contended for by the Government is correct.

We are in accord with the argument set forth in the brief of the plaintiffs in error to the effect that it was not the intention of Congress by the Act of September 8, 1916, to impose a tax upon transfers which had been made prior to the passage of that Act, and further that if the Act were construed to have a retroactive effect, there would be such grave doubts as to its constitutionality that this Court should construe the Act to have only a prospective effect. We feel we can add nothing to the arguments in relation to these matters, and shall therefore confine our argument to the effect of the Act, if it should be construed to have a retroactive effect on past transfers. In so doing, it is not our purpose to ask this Court to first determine whether it would or would not be constitutional for Congress to pass such an Act having a retroactive effect, but merely to add to the strength of the argument presented by the plaintiffs in error, that if it is doubtful that the Act is Constitutional, if given a retroactive effect, then this Court must give such construction to it as would relieve the Act of this question.

If the Act is to be given a retroactive effect, the tax can be sustained, if at all, only as an excise tax. If it is a tax on property, it does not comply with Sections 2 and 9, Article I of the Constitution, which provides the method of apportionment of direct taxes among states.

If the act is to be construed as imposing an excise tax, which takes into consideration past transfers, then it can be sustained, if at all, on three but only three, theories:

(1) That the Government has the right and by the Act in question has imposed a tax on past transfers;

(2) That the Government has the right and the Act does tax the coming into possession of remainders or future estates created by transfers taking effect prior to the passage of the Act; or

(3) That the Act does not tax past transfers but in measuring the tax on transfers made subsequent to the passage of the Act, takes into consideration the value of property transferred prior thereto.

It is submitted that Congress did not intend to impose a tax on any of these theories and that if it did do so, the Act cannot be sustained.

POINT I.

An Act that attempts to assess a tax upon the transfer of property that has been completed theretofore results in an assessment of a tax on the property itself.

The briefs submitted on behalf of the plaintiff in error demonstrates the fact that the transfer of the remainders in the instant case had been completed long prior to the enactment of the law under which the tax was assessed, unless it can be argued that a transfer of a remainder is not complete until it vests in possession. Later in this brief, we shall discuss this question as to the right of the Government to assess a tax on the right of the owner of a remainder to take possession thereof, but for the purpose of this point we shall assume that the transfer of the remainders in question were completed in all respects.

In the case of Shwab *v.* Doyle now pending before this Court (October Term 1921, Docket No. 200), the transfer there involved was that which was effected by a gift which was held to have been made in contemplation of death but there not only the title to the property, which was the subject of that gift, had infeasibly vested in the donee but the property itself had also vested in the donee in possession and enjoyment. Section 202 of the law makes no differentiation between a gift made in contemplation of death and a gift intended to take effect in possession or enjoyment at or after death. It is the contention of the Government that both classes of gifts, although made before the passage of the taxing act, are subject to the tax thereby imposed. It would seem difficult to sustain the Act as to one class of gifts and not as to the other. The Courts have recognized the fact that to attempt to tax a transfer that has already taken place is an anomaly. They have taken the position that after the transfer is complete and the rights of the parties fixed and determined there is nothing left to tax.

In the Matter of Lansing, 182 N. Y. 238, an attempt was made to tax a remainder interest which had been created in 1869 long prior to the enactment of the law of 1897 under which it was attempted to asses a tax. The Court there stated at page 247:

> "Where there is no transfer there is no tax and the transfer made before the passage of the act relating to taxable transfers is not affected by it. * * *"

In Chanler *v.* Kelsey, 205 U. S. 466, on page 480, Mr. Justice Holmes in his dissenting opinion states:

> "If * * * a given state tax must be held to be a succession tax in order to maintain its validity, or if in fact it is held to be a succession tax by the State Court of which it is the province to decide that matter, it follows that such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. * * * if there is no succession, or if the succession has fully vested, or if passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the Fourteenth Amendment has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York." (Citing Matter of Pell, 171 N. Y. 48, 55; Matter of Seaman, 147 N. Y. 69.)

These words are entirely appropriate in considering the act of 1916 if we substitute in place of the word "succession" the word "transfer".

Mr. Justice Holmes there recognized that a tax upon succession which had been completed could not be a tax on the succession and it is equally true that to attempt to assess a tax upon a past transfer is not a tax on the transfer. While the majority of the Court decided that the State of New York could properly assess a tax on the exercise by will of a power of appointment, which power had been created prior to the passage of the tax law, the above statement and principle of Judge Holmes was not and cannot be questioned.

What is the nature of a tax upon a past transfer? It is a tax on the property itself.

An excise tax can only relate to the exercise of some privilege and after the privilege has been exercised it is no longer the object of an excise tax. "When the privilege has ripened into a right it is too late to impose conditions of the character in question." (Matter of Craig, 97 App. Div. 289; affd. 181 N. Y. 551.)

All excise taxes affecting as they do the exercise of a privilege must from their very nature act prospectively only. They are supported on the theory that the taxpayer is not obliged to pay the tax unless he exercises the privilege. To assess a tax on the doing of an act after that act has been completed so that the taxpayer is no longer in a position to elect whether he will or will not exercise his privilege, while it might be denominated an excise tax, would no longer be such, but would constitute a direct tax either on property or against the taxpayer which he could in no way avoid. If the tax is in its nature an absolute and unavoidable demand it lacks one of the chief characteristics of an excise tax. (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 151-2.)

Chief Justice Fuller in delivering the opinion of the Court in Pollock *vs.* The Farmers' Loan and Trust Company, 157 U. S. 429, at page 558 stated that:

> "Ordinarily all taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided are direct taxes."

It is impossible to conceive of any excise or privilege tax acting restrospectively which is not thereby converted into a tax which cannot be avoided by the taxpayer and is, therefore, a direct tax. If this Court should determine that the legislative branch of our Federal Government may in the name of an excise tax impose a tax on privileges which have heretofore been exercised, we must then recognize the fact that in the name of such taxes the Federal Government may confiscate all property, both real and personal, in the United States. This conclusion is inevitable if Congress has unlimited power to enact retroactive excise taxes.

If Congress may pass a law taxing one class of past transfers we should find it difficult to oppose a law which would assess a tax on the last transfer of all property both real and personal in this country whether that tax was a fraction of 1% or was a tax of 99% of the present value of the property transferred. If any property should escape such a tax by reason of the fact that it had never been transferred but had been newly created, then it would seem that Congrss could assess a retroactive excise tax on the manufacture or creation of all such newly created property which had not been transferred. If Congress should attempt to lay such a tax it is submitted that this Court would have no hesitation in finding that this was unconstitutional, in that Congress was in effect imposing a direct tax upon property and not an indirect tax upon the exercise of a privilege in relation to such property.

But where is the line to be drawn? Is it possible to say that Congress may impose a tax upon transfers which took effect last year or the

year before, or all transfers which took effect in the last five years? If Congress may go back one year or five years it may then go back to the time of the inception of this Government. The only logical conclusion is that Congress cannot enact laws imposing taxes on the past exercise of privileges unless it complies with the constitutional limitations in relation to the imposition of the direct taxes on property, if in fact property can be reached in even this manner.

As the plaintiffs in error have pointed out in their brief the state courts have repeatedly declared that transfer and inheritance tax laws similar in charateer to the act now in question cannot act retroactively even though they can impose direct taxes unapportioned and where possible to do so have uniformly construed them as having only a prospective effect, and where the language of the acts in question was unequivocal in referring to past transfers the courts have declared such acts to be unconstitutional so far as they relate to such past transfers. Matter of Pell, 171 N. Y. 48; Matter of Vanderbilt, 172 N. Y. 69; Commonwealth *v.* Wellford, 114 Va. 381; Lacey *v.* State Treasurer, 162 Iowa, 483; State *v.* Safe Deposit and Trust Co., 132 Md. 252; Eury *v.* The State, 72 Ohio, 448; Metter *v.* McLaughlin, 141 Mich. 425; State *v.* Probate Court of Washington County, 102 Minn. 268.)

"Undoubtedly a tax may be *in form* a privilege tax and yet, *in substance*, may be a direct tax on property." (Kansas City Railway Co. *v.* Botkin, 240 U. S. 235). A mere matter of nomeclature cannot change a direct tax on property into an excise tax. (Dawson *v.* Kentucky Distilleries Company, 255 U. S. 288, 292.)

We are not unmindful that the Court in *Brushaber v. Union Pacific R. R. Co.* (240 U. S. 1), held that there was no impropriety in Congress assessing a tax on income which had accrued prior to the passage of the act, but subsequently to the enactment of the sixteenth amendment. The Court there approved and relied upon the decision in *Stockdale v. Atlantic Insurance Co.* 20 Wall, 323. This latter case also dealt with an income tax law, and it is not therefore proper to assume that this Court intended to or did decide that Congress had the power in general to levy excise taxes which would act retroactively. While the Court in the Brushaber case did indicate that income taxes, although imposed pursuant to the sixteenth amendment of the Constitution, might still be regarded for some purposes as excise taxes, nevertheless, the Court must recognize that there is a very great distinction between income taxes and other excise taxes imposed upon the exercise of certain privileges.

The reasoning of this Court in *Pollock v. Farmers' Loan and Trust Company* (157 U. S. 427 and 158 U. S. 601), that income taxes in their final analysis are equivalent to direct taxes upon the property from which they are derived, is convincing. The court at page 626 quoted with approval the following statement of Hamilton: "What, in fact, is property, but a fiction without the beneficial use of it? In many cases indeed, the *income* or *annuity* is the property itself." As indicated in that case, an income tax has that characteristic of an "absolute and unavoidable demand" which is lacking in connection with ordinary excise taxes.

Once we recognize that a tax is unavoidable and inescapable, and that it is proper to levy such a tax, it appears that there is no particular impropriety in making such a tax apply retroactively. Whether there is or is not a tax upon the income from property, it is natural and inevitable that the owners of such property shall desire to enjoy the use or income of that property, and it does not therefore shock the sense of justice if a tax is imposed on the income derived from that property in a preceding year. In other words, if the tax had been imposed prior to the collection of the income during that year instead of after its collection, it is not to be supposed that it would have altered the conduct of the owners of the property in the least particular. They would have still desired to collect such income. They have not been permitted to do something which they would not have done had they known that their act was to result in the imposition of a tax. Similarly, if a tax is imposed on property, it is not material whether it is denominated a tax for a previous year or for the current year.

But this cannot be said in relation to strictly privilege or excise taxes. In all such taxes, there is an element of volition on the part of the tax payer. He may or may not exercise his privilege and subject himself to the payment of the resulting taxes.

While we do not find that the question of the retroactive character of the Corporation Income Tax Act of 1909 has been considered by this Court, that act was declared constitutional in *Flint v. Stone Tracy Co., supra.* That act did not take effect until August 5, 1909, and it did assess a tax on the income of corporations thereby af-

fected, for the whole of the year 1909. While that act was in form on excise tax on the right of the corporations to do business, it did apply to the income of the corporations thereby affected, and might, therefore, be classed with the other income taxes above referred to. For the word "income" is given the same meaning in all of the Income Tax Acts that was given to it in the Federal Corporation Excise Tax Act of 1909. (See Merchants Loan & Trust Co. *v.* Smietanka, 255 U. S. 509, 41 Supt. Ct. 386.) However, the Court in the Flint case recognized that the act did not impose an absolute and unavoidable demand. Mr. Justice Day there stated, at pages 151-2: "The requirements to pay such a tax involves the exercise of privileges, and the element of absolute and unavoidable demand is lacking. If business is not done in the manner described in the statute, no tax is payable." The act in so far as it attempted to lay a tax measured by the income for the full year 1909, undoubtedly was correct in theory in assessing a tax on the privilege of doing business after its passage, but measuring the amount of the tax by the income collected during the full year. However, it would appear from the language used by Mr. Justice Day that if a corporation had dissolved on the day that the act took effect and thereafter ceased to do business as a corporation, the Government could not in that case have collected a tax upon the income which had been received by the corporation from the first of January, 1909, to the date the act took effect. If it had attempted to levy a tax in such an instance, then the tax would have constituted an absolute and unavoidable demand.

As the power to tax also involves the power to destroy, it might be possible for our Federal Gov-

ernment to assess an excise tax on the right of corporations to continue to do business in the future, which would be equal to the total amount of their net incomes in the future. The Government might even go to the extent of saying that for the privilege of continuing to do business in the future, it would assess a tax equal to the total value of all the present assets of a corporation. In neither of these instances, however, would the tax be absolute and unavoidable. The tax payer might relieve itself of the obligation to pay the tax by dissolving or ceasing to do business as a corporation. However, if Congress should lay a tax on the past exercise of the privilege of doing business as a corporation, an entirely new element is injected. If the Government should say, for the privilege of doing business as a corporation which you have heretofore exercised, we shall assess a tax equal to the present value of your present net assets, that could no longer be regarded as a proper exercise of the governmental power to tax excises. It would in effect be a direct tax upon the assets of the corporation and a confiscation of the property of the corporation. If the tax were merely a percentage of the value of the assets of the corporation rather than the whole thereof, it would still be a direct tax.

We must therefore conclude that any act which purports to tax a privilege already exercised is no longer an excise or indirect tax, but a direct tax upon the property itself, or a taxing of property in violation of the Fifth Amendment.

As this law was intended to lay the tax upon the privilege of transfer it is naturally essential that the substance be there on which the law could operate. It must be assumed that there is a transfer in order that the tax may become op-

erative. If there is no transfer there is nothing done, and the statute has no application. To strain the reasoning and assume that transfers previously made would come within the purview of the operation of the law, would be not to tax a thing that is being done or a privilege that is being exercised, but would be to tax the property itself or the ownership thereof. This is beyond the power of the Federal Government without an apportionment of the tax.

In the case at bar the property of Mrs. Lachman in question here had been transferred in 1901, more than fifteen years prior to the enactment of the Federal Estate Tax Act of September 8, 1916. She made no transfer after the act went into effect. So far as this property is concerned she had no property to transfer. Nothing could be done by her to dispossess herself of the title to the property other than that which she had done, and nothing more could be done by the remaindermen or transferees in order to have title vested in them than that which had been done. For the Court to now construe this act retrospectively so as to lay a *transfer* tax on this property would be to say the thing that has been done has not been done, and to conflict with the settled property laws of the State of California and rights of the present owners.

After the passage of the taxing act, Mrs. Lachman had no discretion in the matter. The transfer was completed. The thing had been done and was *fait accompli*. To now tax this transfer would not be the imposition of an indirect tax but would render it in effect a direct tax and one from which the decedent had no chance for escape, or choice of the exercise of discretion.

POINT II.

The Government has not sought to tax the coming into possession of remainder or future interests, and if it did so, the Act would be unconstitutional.

(a) *There is nothing in the Act to indicate that Congress intended to lay a tax upon the coming into possession of remainders or future estates.*

By Section 201 of the Estate Tax Act of September 8, 1906, "A tax * * * equal to the following percentages of the value of the net estate" is "imposed upon the *transfer* of the net estate of every decedent dying after the passage of this Act." In Section 202 in defining the gross estate of the decedent, it is provided that there shall be included therein the value at the time of the decedent's death of all property "to the extent of any interest therein of which the decedent has at any time made a *transfer*, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *".

There is no word in the act which purports to assess a tax upon the coming into possession of future estates. It was as a transfer tax that it was reported by the Ways and Means Committee of the House of Representatives (Report No. 942, 64th Congress, First Session, p. 5). The Treasury Department has definitely stated in Treasury Regulation 37 revised to May, 1917, "This is a transfer tax law."

In view of the explicit language of the act, it would seem to be unnecessary to argue that it was

not the intention of Congress to impose a tax upon the coming into possession of future estates. However, the Government has urged that the tax may be assessed on such a theory.

That it cannot be construed as taxing the coming into possession of remainders will be seen when we consider remainders taking effect not at the death of the decedent, but at sometime subsequently thereto. If A transfers property in trust to pay the income to him for life, and after his death to B for life and after B's death, remainder to C, the provisions of the tax law would assess a tax immediately upon the death of A on the value of the property constituting the trust fund at A's death, although the ultimate remainder would not vest in possession until after the death of the second life tenant. There is no tax on the coming into possession by the remainderman C, and when C does come into possession of the property, no tax is assessed to him or to any other person. Obviously, then it follows that this is not a tax on the coming into possession of property.

(b) To assess a tax upon the right to take possession is to lay a tax upon the property itself.

This Court has recognized that the Federal Government cannot lay an excise tax on the right to the use or enjoyment of property. This was the controlling feature in the decision in *Pollock v. Farmers' Loan and Trust Company, supra.*

The Court there recognized that to tax the income from property was for practical purposes, to tax the property itself. Quoting again the words of Hamilton, "What, in fact, is property but a fiction without the beneficial use of it?"

A similar question was passed upon in *Dawson v. Kentucky Distillery Co.*, 255 U. S. 288, where the Government sought to impose a tax of fifty cents on the withdrawal from bond of every gallon of whiskey. Mr. Justice Brandeis there stated that, " 'The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value.' To levy a tax by reason of ownership of property is to tax the property." The Court, therefore, held in that case, that the tax sought to be imposed was in fact a direct tax and that it could not be sustained, as it did not comply with the provisions of the Constitution in relation to direct taxes.

Since this Court has recognized the fact that to lay a tax upon the right of the owner of whiskey to take possession thereof, was to lay a tax upon the whiskey itself, it would seem to follow inevitably that this Court must also hold that to lay a tax upon a person's right to take possession of a remainder or future estate is to tax the remainder or future estate. There is no real distinction between the two cases.

There is no peculiarity about remainders or future estates. They are definite property rights which have been recognized by the courts from immemorial times. There is no practical distinction between a remainder and a reversion.

However, if we consider the right to take possession of a reversionary interest rather than a remainder, *eo nomine*, then there can be no distinction between the right of a citizen to repossess his property after the termination of some estate therein, which he has granted, and the right of a person to take possession of his whiskey after

placing it in bond. If the Government could assess a tax upon the right to take possession of a reversionary interest, it could under the guise of an excise tax lay a direct tax upon a large part of the real property in this country. It is obvious that the Court would not sustain a law which would assess a tax (although such tax were called an excise tax) on the right of a person to again take possession of his property, after the expiration of a lease which he had granted in relation thereto, prior to the passage of such law, and it should be equally obvious that to tax the taking possession of a remainder would be to tax the property itself.

By an Act passed in 1899, the Legislature of the State of New York attempted in unequivocal terms to assess a tax on the transfer of remainders, the title to which had vested prior to the enactment of the transfer tax statute, but which had not vested in possession or enjoyment at the time of the passage of such Act. The Courts were called upon to consider the validity of such an Act in the *Matter of Pell*, 60 App. Div. 286 (171 N. Y. 48). The Appellate Division came to the conclusion that the Act did not assess a tax upon the right of succession but that the tax sought to be imposed was a direct tax upon property. It stated at pages 291-2:

> "It may seem incongruous that a transfer tax act, which in principle was intended to impose a tax upon the right of succession, should be construed in such a way as to uphold the tax as one upon property. * * *
>
> "Our conclusion, therefore, upon the whole case is that if the tax sought to be imposed could only be supported upon the ground that it is a tax upon the right of succession, then

there would be objections, among them constitutional ones, to its validity; but that with reference to the estate here involved, if the act can be construed—as, with some misgivings, we think it can—as a tax upon property, it is free from constitutional objections, and the tax may be upheld."

The Court of Appeals stated at p. 55:

"If these estates in remainder were vested prior to the enactment of the Transfer Tax Act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation."

The higher court thus affirmed the conclusion which the Appellate Division had reached that the taxes could not be sustained as one on the transfers, but refused to follow the Appellate Division in its conclusion that the act could be sustained as a direct tax. The Court of Appeals found it was not the intention of the legislature to impose a direct tax and that as the act could not be sustained as one taxing transfers it was void.

The decision in the Pell case was expressed with such positiveness and the reasoning is so clear and irrefutable, that it has become the leading case in the country on this question, and has been cited with approval and followed in each state in the Union where a similar issue has been raised.

To amplify the force of this case or elaborate on its effect and soundness in view of the exhaustive and thorough manner in which the brief for the

plaintiff in error has presented it, would be a work of supererogation.

The Circuit Court of Appeals in the action of *Shwab* v. *Doyle*, 269 Fed. 321, now pending before this Court, in sustaining the assessment of the tax which was considered in that case, placed reliance upon the decision of this Court in *Wright* v. *Blakeslee*, 101 U. S. 174. We submit that this was unwarranted and that the decision in that case is not determinative of the question here presented. In that case, the Court was asked to determine whether the vesting in possession of "a bare contingent remainder expectant upon" the death of the owner of the precedent life estate, was a succession within the meaning of Section 127 of the Internal Revenue Act, of June 30, 1864, 13 Stat. at L. 287. That Act provided "that every past or future disposition of real property * * * by reason whereof any person shall become beneficially entitled in possession or expectancy, to any real estate or the income thereof, upon the death of any person dying after the passage of this Act, shall be deemed to confer on the person entitled by reason of any such disposition a 'succession'; * * *"

The terms of the will there considered, which had taken effect in 1846, devised to the executors thereof certain real property in trust to receive the rents and profits and apply them to Henrietta Wright during her life, with a gift over to her issue her surviving. All the Court decided was that upon Henrietta Wright's death, her children became beneficially entitled in possession to the property devised, and came within the definition of a succession as contained in the act. So far as the opinion of the Court shows it was not asked

to and did not consider whether our Federal Government could properly assess a tax on the taking possession of the property by the children of the said Henrietta Wright, under an act imposing a tax on transmission of property.

The Court below in *Shwab* v. *Doyle*, at page 324 of its opinion, after stating "The theory of taxation on account of transfers testamentary in character, is that death is the generating source of the tax" proceeded as follows:

> "The transfer is accordingly taxed only at the death of the transferor, no matter how long the transfer may precede death. Congress has accordingly included the two classes of transfers in one and the same section and subjected them, so far as terms go, to precisely the same treatment. In our opinion a transfer intended to take effect in possession or enjoyment after the grantor's death would under this statute, be taxable, although made before the passage of the act. *Wright* v. *Blakeslee*, 101 U. S. 174-6, 25 L. Ed. 1048. The natural inference would be in the absence of special evidence to the contrary, that the same result was intended as to transfers made in contemplation of death."

It will be noted, however, that in *Wright* v. *Blakeslee*, thus cited by the Court in support of this proposition, the generating source of the tax was not the death of the grantor, but the coming into possession of the property after the death of the owner of a precedent life interest.

Moreover the nature of the act of 1864 was essentially dissimilar from the act now under consideration. The act of 1864 assessed a tax on the succession or right of a person to receive property, whereas the present act is a tax upon the transfer of that property from the decedent.

In *Curley* v. *Tait* (276 Fed. 840), where the Court was considering the same issue here presented it was stated:

> "In *Shwab* v. *Doyle, supra,* the case of *Wright* v. *Blakeslee*, 101 U. S. 174, 25. L. Ed. 1048, was cited as authority for holding a similar statute retroactive. The act there construed imposed a tax upon the succession —that is upon the right to receive—and was levied on what passed to the heir, devisee, legatee, distributee or successor and not upon the estate. *Knowlton* v. *Moore*, 178 U. S. 41-42 et. seq. 20 Sup. Ct. 747, 44 L. Ed. 969. The distinction is neither pedantic nor technical, but, as applied to the matter now in hand is in the highest degree practical."

We therefore submit that the case of *Wright* v. *Blakeslee* is not an authority in opposition to the views which are here presented.

(for no such statute was involved)

The case of *Moffitt* v. *Kelly*, 218 U. S. 400, is cited as authority for the proposition that the coming into possession of property is a proper subject of taxation. This Court did not pass upon the propriety of such a tax, but merely determined that the State of California ~~in~~ could pass~~ing~~ a law imposing a tax upon the coming into possession of already created and vested future interests, ~~did~~ and not thereby violate any provision of the Constitution of the United States, and held that it was entirely a local question, and that the determination of the Courts of California was conclusive, and as the sovereign state has the right to impose direct taxes upon property, the United States was not concerned with "the question whether or not the wife's interest under the circumstances was correctly subjected to the tax." *Moffitt* v. *Kelly*, supra, page 405.

The case at bar does not present the question as to whether the Government may lay a tax upon an incomplete transfer where there is some privilege granted to the citizens which must be exercised before the transfer is finally completed.

In *Cahen* v. *Brewster*, 203 U. S. 543, 51 L. Ed. 310, where the Court sustained the tax laid by the State of Louisiana in an act which provided that the tax was "to be collected on all successions not finally closed and administered upon, and all successions thereafter opened", the Court held that so much of the succession as had actually vested in possession and was no longer in the process of administration, was not subjected to tax.

To the same effect is the decision in *Carpenter* v. *Pennsylvania*, 58 U. S. (17 How.) 456, where a tax upon an estate still in the course of administration, was sustained.

In this case, the tax payer exercised his privilege of using the probate machinery of the state in order to come into possession of his succession. The holding of the Court in these cases is in line with the case of *Patten* v. *Brady*, 184 U. S. 608, where the court held that a law assessing an additional excise tax on the manufacture, sale or removal for consumption or sale of tobacco, was valid, and could be sustained while the property was held for sale and before it passed into the hands of the consumer; also with that in *Billings* v. *United States*, 232 U. S. 261, where the Court sustained a tax on the use for pleasure of a foreign built yacht. In this case there was a continuing use of the yacht after the passage of the act.

In the instant case, no machinery of Government is availed of, or could be availed of, because everything necessary to give title to this property was

done fifteen years ago, and nothing of the transaction remained uncompleted.

POINT III.

The taxation of past transfers cannot be sustained upon the theory that the past transfers are not themselves taxed but may be used in measuring the tax upon the other assets of the decedent.

It is a cardinal rule of construction that any written instrument or act shall be given such interpretation that all parts of it shall be given effect.

It is not possible, however, to give effect to all parts of the act in question and at the same time sustain the tax thereunder of past transfers on the theory that the past transfers are not themselves taxed, but simply used as a measure of the tax to be imposed upon the assets of which the decedent dies possessed. This theory might be correct if the act only subjected the assets of which the decedent dies seized or possessed to the lien of the tax, but the Government has been careful to avoid the results which would arise if they limited the collection of the tax to such assets, and has explicitly provided in section 209 of the act that "if the decedent makes a transfer of or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death * * * and if the tax in respect thereto is not paid when due, the transferee or trustee shall be personally liable

for such tax, and such property to the extent of the decedent's interest therein at the time of such transfer, shall be subject to a like lien equal to the amount of such tax." (The lien referred to being that which is imposed upon the gross estate of the decedent by the previous paragraph of the same section.)

Is it possible to give effect to this provision of the law and at the same time say that past transfers are merely used for the purpose of measuring the tax to be imposed? It would seem obvious that this is not so. If the tax is only a tax on the transfer of the property of which the decedent dies seized and possessed, and is not a tax upon the past transfers, upon what possible theory can the Government require payment of a tax upon the transfer of property owned by the decedent by a person who has no share or interest in that property? If the Government could do this it could pass a law assessing a tax on A and then say if A does not pay his tax, it shall be paid by B, or that when A dies his estate shall pay a tax based on the value of B's property.

We submit that the Government must either reject this theory of measurement or claim that section 209 of the act is invalid and inoperative.

But the Government for its own protection, must assert the validity of section 209 of the act, and in fact it is doing so in this present action of *Levy* v. *Wardell*. In that case the decedent left no estate whatever and there was no administration on her estate. She had transferred prior to her death certain shares of stock, and at the time of such transfer the transferees agreed to pay her dividends on the stock during her life. The transfers of such stock had taken place on December 19,

1902, and January 14, 1903. The Government, however, has insisted that the act in question imposed a tax upon the transfer of that stock which was payable by the transferees.

Surely the Government cannot afford to take the position that no tax is incurred if a person transfers all his property before his death, by gifts which are made in contemplation of death or which take effect in possession at his death. If such is a correct construction of the statute, then a person might, without great inconvenience, avoid the payment of the tax, by disposing of his property by transfers *inter vivos*. Moreover, such an argument disregards the plain language of the act.

Referring again to section 209 of the law, we find that the tax which is imposed on the transferee is the "tax in respect" of the transfer to the transferee.

Consider the clear terms of section 201 "that a tax * * * equal to the following percentages of the value of *the net estate* to be determined as provided in section 203, is hereby imposed upon *the transfer of the net estate* of every decedent dying after the passage of this act * * *." Section 203 provides that the value of the net estate shall be determined by making certain deductions from the value of the gross estate, which is determined as provided in section 202 by including the value at the time of death of all property "to the extent of any interest therein of which the decedent has at any time made a transfer * * *".

It is idle in view of the provisions of section 209 to argue that the net estate, the transfer of which is taxed, is different from the net estate, the value of which is used in determining the amount of the tax.

Even if the law were susceptible of such a strained construction as that for which the Government contends, the argument of the Government is in other respects unsound.

We recognize that it is entirely proper for the Government to measure various excise taxes on the value of property or of the income therefrom, which is involved in connection with the exercise of the privilege which is taxed. For example, the cases of *Flint* v. *Stone Tracy Co., supra, McCoach* v. *Minehill R. R. Co.*, 228 U. S. 295, and *Anderson* v. *Forty-Two Broadway Co.*, 239 U. S. 69, where this Court held that it was proper to measure the tax upon the right of doing business by a corporation by the total income of the corporation no matter from what source it was derived.

Also *Keeney* v. *New York*, 222 U. S. 525, and *Plummer* v. *Coler*, 178 U. S. 115, where the Court held that it was proper to measure a transfer tax by the value of the property transferred.

Maxwell v. *Bugbee*, 250 U. S. 525, is also in line with these decisions. In that case this Court held, and it would seem properly so, that in assessing a tax on the privilege to succeed to property within the jurisdiction of the state of New Jersey, that state might with propriety, in determining the rate of tax, consider the property which was not within its jurisdiction. The New Jersey statute in effect provides that in determining the rate or percentage of tax to be imposed on the transfer of property within the state of New Jersey, the taxing authorities shall consider the value of property without the state of New Jersey which is transferred by the same act to the same person. After the rate or percentage of the tax is determined, that rate is only applied to the value of the prop-

erty subject to the jurisdiction of the state of New Jersey, which is transferred. No attempt is made by indirection to assess a tax on the transfer of property not within the jurisdiction of the state. We are confident that had the state of New Jersey passed a law in form assessing a tax on the transfer of property within the jurisdiction of that state, but which had said that the measure of that tax should be an amount equal to the tax which would have been assessed on all the property transferred, both within and without the state of New Jersey, if all such property had been within the state of New Jersey, the Court would have declared that that was not a proper exercise of the taxing power of that state, and would have held that the state of New Jersey could not do indirectly that which it could not do directly, and could not assess a tax upon the transfer of property which was not within its jurisdiction.

In *Knowlton v. Moore*, 178 U. S. 41, Chief Justice White in the course of the opinion of the Court, said, at page 76:

> "Granting, however, there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value,

but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth $1,000, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of $10,500, bequeaths to an hospital $10,000. The rate of tax would be 5 per cent, and the amount of tax $500. Another person dies at the same time, leaves an estate of $1,000,000, and bequeaths $10,000 to the same institution. The rate of tax would be 12½ per cent, and the amount of tax $1,250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construction must produce. Clear as it is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given."

While refusing to express an opinion in relation thereto, the Court raised a doubt as to the validity of a law which would assess a tax on the property of one and fix the rate of tax on property of another, and stated at page 77:

"It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary pro-

vision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

While we recognize the War Revenue Act of 1898, in review in *Knowlton* v. *Moore*, imposed a succession, rather than an estate or transfer tax, the clear reasoning of Chief Justice White is applicable here. If it is improper to assess a tax on the house of A, only worth $1,000, at a rate to be determined by attributing to A's house the value of B's house, which may be worth a hundred fold that amount, then it is equally improper to assess a tax upon the transfer of the property owned by a decedent at the time of his death, and measure that tax by the value of the property transferred by him prior to his death, which may in turn be worth a hundredfold the amount of the property of which the decedent died possessed. To hold that such a scheme of taxation is valid, is to say that while Congress cannot directly tax a past transfer of property, it may indirectly do that which it is forbidden to do directly. This Congress cannot do. *McCoach* v. *Minehill Ry. Co.*, 228 U. S. 295; *Wallace* v. *Hines*, 253 U. S. 66.

POINT IV.

The taxation of past transfers of property under the Act of 1916 is repugnant to the Constitution of the United States and to those fundamental concepts of free government which underlie all Constitutional systems.

We endorse the views expressed in the brief submitted on behalf of the plaintiff in error to the effect that the fifth amendment applies to the whole Constitution, and that each and every portion thereof must be read in connection with that amendment. While the fifth amendment does not place an inhibition on the power of Congress to lay and collect taxes, nevertheless it does require that the tax laws shall not violate the provisions of the fifth amendment, and deprive persons of their property without due process of law. As this Court has said in speaking of the various portions of the Constitution "each and all shall be respected and observed". (Prout *v.* Starr, 188 U. S. 537-544.) Without regard, however, to whether the fifth amendment places any restraint upon the taxing power of Congress, we must nevertheless recognize that there are restraints upon that power and that Congress may not under the cloak of a taxing statute, arbitrarily take private property for public use without compensation.

Regardless of whether the fifth amendment does or does not place a restraining hand upon the power of Congress in relation to taxation, we may assert without fear of controversy, that the Courts have always recognized that a taxing statute to be valid, must be equitable in its nature

and general in character. This requisite of a tax law has sometimes been characterized as "uniformity".

While it is true that this Court has determined that the provision of the Constitution requiring that excise taxes shall be uniform has only a geographical significance, nevertheless this Court has recognized that there must be an element of uniformity in all tax laws. For example, Mr. Justice Field in his opinion in *Pollock v. Farmers' Loan and Trust Company*, 157 U. S. 429, at page 599, stated:

> "The inherent and fundamental nature and character of a tax is that of a contribution to the support of the government, levied upon the principle of equal and uniform apportionment among the persons taxed, and any other exaction does not come within the legal definition of a tax.
>
> "This inherent limitation upon the taxing power forbids the imposition of taxes which are unequal in their operation upon similar kinds of property, and necessarily strikes down the gross and arbitrary distinctions in the income law as passed by Congress. The law, as we have seen, distinguishes in the taxation between corporations by exempting the property of some of them from taxation and levying the tax on the property of others when the corporations do not materially differ from one another in the character of their business or in the protection required by the government. Trifling differences in their modes of business, but not in their results, are made the ground and occasion of the greatest possible differences in the amount of taxes levied upon their income, showing the action of the legislative power upon them has been arbitrary and capricious and sometimes merely fanciful."

Again we find this requirement for equality and uniformity pointed out by Mr. Justice Day in *Southern Ry. Co. v. Greene*, 216 U. S. 400, 417:

> "While reasonable classification is permitted without doing violence to the equal protection to the laws, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the thing in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. 'Arbitrary selection' it has been said cannot be justified by calling it classification."

The requirement of uniformity is in the very essence of constitutional law, and although the Constitution grants to Congress powers of taxation, they are grants of lawful power with the inherent restrictions which distinguish a "government law" from a government of men who usurp arbitrary power. Whether these inherent restrictions are expressed in the uniformity clause or are found in the nature of the taxing power is immaterial. The important thing is the fundamental principle, which is a part of both, that arbitrary discrimination cannot be reconciled with law.

Attorney-General Olney and Assistant Attorney General Whitney, in their arguments in the income tax cases, admitted this inherent limitation on the general taxing power. See 157 U. S. at page 507, and 157 U. S. at page 474, where Mr. Whitney said,

> "there is, however, a certain degree of uniformity involved in the very word 'tax'; a uniformity requirement involved in the defin-

ition of that word and guaranteed by the Fifth Amendment to the Constitution. * * * A special tax cannot be laid upon A simply because he is A and not B. Such a law would be an attempt to exercise not a taxing power, but the power of eminent domain, and would require compensation for the property taken. Thus the constitution of Pennsylvania provides that taxes shall be 'uniform on the same class of subjects'; while the Supreme Court of that State has decided that this requirement is merely declaratory." Kitty Roup's case, 82 Penn. St. 211.

Chief Justice White, while insisting that the fifth amendment did not circumscribe the power of Congress in relation to taxation, nevertheless recognized that there were limitations upon such power (Knowlton *v.* Moore, 178 U. S. 41). In the excerpt from his opinion which we have heretofore quoted, he said that "aside from express constitutional restrictions" arbitrary taxation would "transcend the limitations arising from those fundamental concepts of free government which underlie all constitutional systems."

Again in *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, 24, he further stated:

> "* * * this doctrine [that the fifth amendment is not a limitation upon the taxpayer] would have no application in a case where although there was a seeming exercise of the taxing power, the act complained of was so *arbitrary* as to constrain to the conclusion that *it was not the exertion of taxation* but a confiscation of property; that is, a taking of the same in violation of the fifth amendment; or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross

and patent inequality as to inevitably lead to the same conclusion." (Italics ours.)

Again we find this statement in *Chase* v. *United States*, 222 Fed. 596:

> "No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed." Citing *Choate* v. *Trapp*, 224 U. S. 665, 670, 677; 56 L. Ed. 941; *Jones* v. *Meehan*, 175 U. S. 1; 44 L. Ed. 49; *In re Heff*, 197 U. S. 488, 504; 49 L. Ed. 848.

The confidence of a people in the security of their property and person, free from legislative encroachment is their confidence in organized society and this is the foundation of the different states and governments of the world. This is an essential principle of governments and is elemental in the building up of governments and the peace, prosperity and happiness of its citizens. If this act of 1916 be construed to affect past transfers of property particularly a transfer such as that which is presented in these cases, how far can it be said that it complies with this general requirement in relation to taxing statutes? Does it not shock the conscience to suppose that Congress could enact a law assessing past transfers which may, and no doubt if this law be so construed, will deprive the chief objects of the testators' bounty of their inheritance?

It is usual in making such transfers for persons to reserve the income for life, of the property so transferred, thus bringing the transfers under what the government claims is the provision of this act of 1916.

It would not be difficult to find men who have given away large portions of their fortunes for charitable purposes leaving what they then supposed would be a sufficient estate to provide for those near to them, and dependent for their livelihood upon their bounty, and yet the Government would have us believe that Congress intended to and can pass a law long after these transfers have been made assessing a tax thereon, and saying that that tax shall not be paid by the persons who receive the property, but shall be paid by the executor or administrator of the decedent's estate, even if the payment of that tax absorbs the entire estate of the decedent. Nor does the Government give any consideration to the fact that these transfers are complete and unconditional and that the transferor, after the passage of the law, has no power to modify or affect the result of the taxing statute in any decree. Although he might recognize that should the act be held to affect his previous transfers of property, his widow and children would be deprived of their inheritance and he might desire to avoid the consequences of his previous generous impulses but would be absolutely powerless to do so. Can it be possible that any law would be valid which can so deprive a man of the power to effect a distribution of his property in the manner which he deems proper?

It is, of course, possible for the sovereign states to pass laws which shall control the disposition by will of decedents' estates, but surely it cannot be that the Federal Government can through the guise of a taxing statute say that those persons who have previously to the passage of that law, made transfers of their property, shall be de-

prived by reason thereof, of their power to effect a proper and equitable distribution of the property which they still retain, or that they shall be deprived of such power in relation to a large portion of the property which they have not yet disposed of. This is not taxation but confiscation.

If it could be conceived that Congress can have the right to lay a tax upon the transfer of property which has been made previously to the passage of the taxing act, that would not answer the criticism of the act of 1916, if it be construed to tax such transfers. For this act of 1916 requires the payment of the tax not by the transferees, not by the persons who have been benefited by them, but by the executor or administrator of the transferor's estate, and the act only provides for the payment of the tax by the transferee in the event that the executor or administrator has not a sufficient amount with which to satisfy the tax.

We are cognizant that this is not a succession tax, that it is not a tax upon the right of persons to receive the property, but is a tax on the transfer of the whole estate. However, without regard to the exact theory upon which it is assessed, it is certain that the tax must be paid by some person or collected out of some property, and this presents the question as to how far Congress may go in saying that A shall pay B's tax. After the transfer has been made and the transferor has parted with all title and interest in the property and all control over it, as in the case of a gift made in contemplation of death, for the Government to then say that the executor of the transferor shall pay a tax in relation to that transfer, is to require the payment of a tax on that transfer by a person who has no interest in the property transferred or

in the transfer of the property. It is submitted that this is not taxation, but arbitrary confiscation of property.

Moreover, we further submit that if this act be construed to tax past transfers, it amounts to arbitrary selection of certain transfers, rather than a proper classification of transfers for the purposes of taxation. If the act be construed to apply to past transfers, then we must consider the following.

Two remainder interests are transferred on the same day. They are both to take effect in possession on the death of the transferor. The transferor of one of the remainders dies before the Revenue Act of 1916 took effect and the other transferor dies subsequently thereto. One remainder is taxed, the other is not. Let us assume that both remainders vested absolutely at the time of the transfer thereof. The remainder which vested in possession prior to the passage of the act must therefore have been of the greater value, assuming that the amounts involved in each case were equal, but that remainder escapes taxation and the remainder which is the less valuable of the two, is subjected to the payment of a tax. Is this such reasonable classification that the Courts may not interfere?

Again let us suppose that two gifts are made in contemplation of death on the same day, and the donor in one case dies before the passage of the act and in the other instance dies subsequently thereto. Again we find the same discrimination.

It must be borne in mind that Congress has not endeavored and could not assess a tax by reason of the death of the donor or transferor, but is assessing a tax on the transfer. Can it be claimed

that it is proper classification for Congress to say, we will tax gifts the donors of which have not as yet died, but we will not tax gifts the donors of which have died. The gifts are precisely the same in both instances. In case of the gifts made in contemplation of death, they have both indefeasibly vested not only as to the title, but in possession. Can this be defined as proper classification? If Congress may thus differentiate, might it not with equal propriety say that transfers written on blue paper should be taxed while those written on white paper should not be taxed?

We are familiar with the statements that have been made that death is the generating source of the tax. That may be true in relation to taxes on transfers effected by death, that is on the transfer of property by will or under the intestate laws, but in the case of transfers made *inter vivos* it is absurd to say that death is the generating cause of such a tax. The thing taxed unless it is the property itself, is the transfer of the property, and that transfer is the generating cause and not the death of the transferor.

There are other features of the law which are also objectionable. If it be construed to tax past transfers, it assesses a tax on the value of the property at the date of death of the transferor, rather than at the date of the transfer. As the generating source of the tax is the transfer, we submit that it is an improper method of measuring the tax, to state that the value of the property transferred at a date fifteen years subsequently to the transfer, shall be the measure of the tax. As pointed out in the brief of the plaintiffs in error, very great increases in value might have resulted subsequently to the transfer, and before the

death of the transferor, increases by which neither the transferor nor the transferee are benefited. For example, the property transferred may have been sold by the transferee before the increases occurred. It would seem that such a scheme of taxation would be so arbitrary that the Courts would not sustain it as being taxation at all, but would again recognize it as a confiscation of property, or at least a taking of property without due process of law.

Can Congress say, if you transfer your property now, you shall be required to pay a tax on the value of that property at the time of your death, which may be ten, thirty or fifty years later? Is it proper to tax two transfers made ten years ago, one at the value which the property transferred now bears, and to tax a similar transfer of the identical property upon the basis of the value of that property ten years from now? A law which leads to such confusion, uncertainty and to such arbitrary exactions, cannot be considered a valid taxing statute.

It has been recognized by the state courts that transfers *inter vivos* were taxable in accordance with the law as it existed at the date of the transfer. *Matter of Sloan*, 154 N. Y. 109; *Matter of Davis*, 149 N. Y. 539; *Potter* v. *Chambers*, 63 Cal. Des. 141.

In *Matter of Hodges*, 215 N. Y. 447, the New York Court of Appeals again recognized this and stated that gifts *inter vivos* were taxable when made, which in effect recognizes that the tax must be based upon the value at the time the transfer was made.

In closing our argument, we cannot do better than to quote from the opinion of Judge Rose in

Curley v. *Tait*, 276, Fed. 840-844, where this act was under consideration. The Court had just previously in its opinion been considering the decision in *Shwab* v. *Doyle*, now pending before this Court, and stated:

"Apparently the court's attention was not drawn to some of the consequences which, in a case like the one at bar, would follow from a retroactive construction. The present act, unlike its federal predecessor, is an estate tax, and not a tax upon the right to receive. If the government's contention be sustained, the tax will come, not as in Wright *v.* Blakeslee, *supra*, or in Cahen *v.* Brewster, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310, 8 Ann. Cas. 215, out of the sum received by the one to whom the taxed property passes, but will be collected from one to whom it does not. Neither the Johns Hopkins Hospital nor the Johns Hopkins University will pay one cent of it. It will all come out of the property going to Grafflin's widow. Would Grafflin have made any of these transfers, had he understood by so doing he would impose a charge upon his wife of upwards of \$23,000? The care with which certain limitations were introduced into each of the agreements would seem to make it highly improbable.

"It is easy to conceive of a case in which a man of large estate might, before the passage of the act of 1916, have made considerable transfers to relatives, friends, or to charitable or educational institutions in somewhat the same fashion as Grafflin did, reserving for some residuary legatee a comfortable and even handsome balance of his estate. If the government is right, such legatee might be stripped of every penny of the testator's bounty. The taxes on the transferred property might amount to more than the residue of the estate, large as the testator had every

reason to suppose it would be, and the Supreme Court, in language already quoted, has held that the courts will not assume that Congress intended any such consequences. Union Pacific R. R. Co. *v.* Snow, *supra.*"

We therefore respectfully submit that this act cannot be retroactively applied and if retrospectively applied, is unconstitutional, because (1) it would be a direct tax on property without apportionment in accordance with the provisions of Sections 2 and 9 of Article I of the Constitution; (2) it is a taking of property without due process of law; (3) it is a taking of private property for public use without just compensation in violation of the fifth amendment of the Constitution; (4) it is an arbitrary selection and not a classification; and (5) to apply a tax as the government contends in this case is violative of the general principles of justice which underlie all constitutional systems.

Respectfully submitted,

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